Supreme Court, U.S.
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No. 99-1568

IN THE

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

v.

PATRICK J. MALONEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Respondent objects to the questions as set forth by the Petitioner in his Petition to the Supreme Court pursuant to Supreme Court Rules 15(2).

1. Whether the First Circuit Court of Appeals properly found that Maloney was entitled to judgment as a matter of law on Britton's constitutional malicious prosecution claim?

    a. Whether plaintiff waived argument relative to any First Amendment or Equal Protection claims?

2. Whether the First Circuit's remand of the determination of the damage award was proper?

3. Whether Britton was seized within the meaning of the Fourth Amendment?

4. The First Circuit properly determined that there was no Fourth or Fourteenth Amendment violation based upon the retention of Britton's rifle or the brief initial detention of Britton?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at *Britton* v. *Maloney*, 196 F.3d 24 (1st Cir. 1999). The opinion of the United States District Court for the District of Massachusetts is reported at *Britton* v. *Maloney*, 981 F. Supp. 25 (D. Mass. 1997). Both decisions are reproduced in the Appendices to the Petition (App. A, page 1a –22a, App. B, page 23a – 90a), respectively.

BASIS OF JURISDICTION

The Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). Respondent is satisfied with this statement of jurisdiction.

STATEMENT OF THE CASE

Respondent is not satisfied with the Statement of the Case presented in the Petition as it contains misstatements of the record below, and his own conclusions of law. The Defendant adopts as his Statement of the Case the Background section set forth in the opinion of the First Circuit Court of Appeals ("First Circuit"). Defendant refers the Court to pages 26 through 27 of *Britton* v. *Maloney*, 196 F.3d 24 (1st Cir. 1999), contained in Petitioner's Appendix A, pages 2a – 5a.

The First Circuit found that the district court erred in denying Maloney's motion for judgment

as a matter of law on Britton's constitutional malicious prosecution claim as "Maloney's pursuit of baseless criminal charges did not violate Britton's Fourth Amendment rights in this case" *Britton* v. *Maloney,* 196 F.3d 24, 28. The First Circuit further held that district court properly denied Maloney's motion for judgment as a matter of law on Britton's state law malicious prosecution claim as the court found that Britton terminated his criminal case with success . . ." *Id.* at 31 (App. A, pages 10a – 13a). As a result, the First Circuit directed a new trial on damages based on plain error because of the parties failure to object to the trial court's verdict form which may have resulted in confusion as to the awarding of damages and the plain error that this may have caused to both parties.

The First Circuit determined that Britton's attempt to revive Counts 8 and 10 (deprivation of liberty without due process of law based upon the interrogation of Britton at the station. Appendix A, pages 2a – 3a) failed and that the district court properly granted judgment as a matter of law against Britton.

Finally, the First Circuit's Order of the Court dated December 23, 1999, in response to Petitioner's Petition for Rehearing decided that Britton waived any First Amendment or Equal Protection Clause claim. (App. C, page 92a).

REASONS FOR DENYING THE WRIT

Pursuant to Supreme Court Rule 10 "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. According to Rule 10, compelling reasons can be found, among other things, if the decision leading to the petition: contributes to a conflict of authority between the courts of appeal and/or state courts of last resort; reflects a departure from the usual course of judicial proceedings; presents an important question of federal law that has not been but should be settled by this Court.

Petitioner has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. Petitioner does not and cannot contend that the decision in the First Circuit has created a split of authority among the federal courts or between the federal and state courts. Instead, Petitioner attempts to invoke this Court's authority by asking it to correct errors supposedly committed in the lower courts. For the reasons explained below, there were no errors in the First Circuit. The First Circuit properly reviewed Petitioner's claims against Respondent Maloney when ruling on Respondent's motions for summary judgment and for judgment as a matter of law. The First Circuit read the record in the light most favorable to the Petitioner for all the questions before them. *Britton* v. *Maloney,* 196 F.3d 24 (1st Cir. 1999), *citing, Collazo-Sanitago* v. *Toyota Motor Corp.,* 149 F.3d 23, 27 (1st Cir. 1998), *St. Hilaire* v. *City of Laconia,* 71 F.3d 20, 24 (1st Cir. 1995).

I. THE FIRST CIRCUIT PROPERLY FOUND THAT MALONEY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON BRITTON'S CONSTITUTIONAL MALICIOUS PROSECUTION CLAIM.

The First Circuit properly found that Maloney was entitled to judgment as a matter of law on Britton's constitutional claim under a Fourth Amendment analysis.

Britton argues that the First Circuit upheld the Jury's Verdict that Maloney filed charges as a retaliatory response to Britton (App. A, page 13a) and thus the First Circuit should have sustained the Federal 42 U.S.C. § 1983 verdict under the Fourth Amendment, the First Amendment or the Equal Protection Clause. . This is not the case. The First Circuit held that the filing of charges as a retaliatory response supported the state claim of malicious prosecution and was not sufficient to sustain a Fourth Amendment violation. *See, Correllas* v. *Viveiros,* 410 Mass. 314, 572 N.E.2d 7, 10 (1991).

The First Circuit agrees with the plurality of the Supreme Court's decision in the *Albright* case, but decides the case on a different basis. The First Circuit assumes, for the purposes of their analysis, "that the type of conduct which constitutes a malicious prosecution under state law can sometimes constitution a violation of the Fourth Amendment as well." *Britton* v. *Maloney,* 196 F.3d 24, 28 (1st Cir. 1999). But the First Circuit goes on to state that "even if we take this assumption to be true, we do not believe that Maloney's pur-

suit of baseless criminal charges violated Britton's Fourth Amendment rights in this case." *Id.* at 28. Although there are similarities between a malicious prosecution claim and a Fourth Amendment claim, the two causes of actions are not identical in every respect. *Id.* The First Circuit held that "for a state actor to violate the Fourth Amendment by initiating a malicious prosecution against someone, the criminal charges at issue must have imposed "some deprivation of liberty consistent with the concept of [a] 'seizure'" *Id., citing, Singer* v. *Fulton County Sheriff,* 63 F.3d 110, 114-16 (2d Cir. 1995). Since the Fourth Amendment refers only to unreasonable "searches and seizures" the "crux of the inquiry is whether a "seizure" occurred . . . the essential elements of actionable section 1983 claims derive first and foremost from the Constitution itself, not necessarily from the analogous common law tort." *Id.* at 29, *citing, Calero-Colon* v. *Betancourt-Lebron,* 68 F.3d 1, 4 (1st Cir. 1995). Therefore, since Britton was not "seized," the First Circuit determined that there was no Fourth Amendment malicious prosecution claim. (See Section II below).

a. Plaintiff Waived Argument On Any First Amendment Or Equal Protection Claim.

The district court's ruling on Maloney's motion for judgment as a matter of law was decided on the basis of the Fourth Amendment only. The district court noted: Since I have found that the

Fourth Amendment adequately states a claim, I need not address whether this claim could have been cognizable under the First Amendment or Equal Protection theory as well," *Britton* v. *Maloney,* 981 F. Supp. 25, 40 n.29 (1st Cir. 1997). Since the district court's ruling on Maloney's motion for judgment as a matter of law was not decided on a First Amendment or Equal Protection basis, the First Circuit determined that Britton adopted this analysis and therefore, Britton waived this issue. (App. C, page 92a). Nor did Britton at any time use the words "First Amendment" or "Equal Protection" in the District Court proceedings. (See Footnote 29 at App. B, page 50a).[1]

The First Circuit's Order of the Court dated December 23, 1999 (App. C, pages 91a – 93a) disposed of these arguments in a single paragraph (App., C, page 92a). In addressing this argument the First Circuit held that "although the proceedings below made passing references to the First Amendment and Equal Protection Clause, the district court resolved the case in terms of the Fourth Amendment. Britton accepted this approach and adopted it in his post-trial submissions as well as his briefs and arguments before us. Under these circumstances, he has waived the claim." (App. C, page 92a). The First Circuit cites *Irving* v. *United States,* 162 F.3d 154, 159

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[1] Britton makes reference of the First Amendment and Equal Protection Clause in his Opposing Brief dated February 16, 1999 (App. J, page 116a). This scant reference is diminimis and not enough to preserve the argument before the First Circuit.

(1st Cir. 1998)(en banc) which states: "In the ordinary course, a party seeking to preserve a point for review must present it seasonably in *both* the trial and the appellate courts and offer developed argumentation in support." (emphasis added), *cert. denied,* 68 U.S.L.W. 3222 (U.S. Oct. 4, 1999). This was not done.

Britton argues that the First Circuit should have looked for alternative constitutional rights under which to affirm the 42 U.S.C. § 1983 claim and for alternative reasons to affirm the District Court's opinion. Britton cites *Hachikian* v. *FDIC,* 96 F.3d 502, 504 (1st Cir. 1996) (stating that the court of appeals is not wedded to the trial court's rationale, but may affirm its ruling on any ground made manifest by the record). The First Circuit determined that Britton waived any First Amendment or Equal Protection claims. The appeal was argued by both sides and decided on the strength of the district court's Fourth Amendment reasoning. *See Morales* v. *Ramirez,* 906 F.2d 784, 786 (1st Cir. 1990) ("That intricate legal riddles spark judicial interest is not enough to justify a court in volunteering solutions."). Thus, these issues were properly decided in the First Circuit and Maloney was entitled to judgment as a matter of law on Britton's constitutional claim under a Fourth Amendment analysis.

II. BRITTON WAS NOT SEIZED WITHIN THE MEANING OF THE FOURTH AMENDMENT

Britton argues that the First Circuit erred when it ruled that he was not seized because he was not arrested, having only received a summons. Britton argues that this ruling is squarely in conflict with this Court's ruling in *Albright* v. *Oliver,* 510 U.S. 266, 271, 114 S. Ct. 807, 812 (1994). This is not the case because "it is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." *U.S.* v. *Dionisio,* 410 U.S. 1, 8 (1973); *see also United States* v. *Doe (Schwartz),* 457 F.2d 895, 898 (2nd Cir. 1972) ("The obligation to appear is no different for a person who may himself be the subject of the grand jury."). In *Dionisio,* the Supreme Court espoused a clear distinction between compulsion exerted by a summons or subpoena versus by a physical seizure:

> The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and in case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times

> under the control and supervision of a court.

Dionisio, supra at 9 (quoting *Doe (Schwartz), supra* at 898.

The First Circuit agreed "here, Britton was never arrested or detained on the underlying criminal charges that form the basis of his malicious prosecution claim. After Maloney filed the criminal complaint against him, Britton received a summons in the mail. No warrant was required to secure his appearance at the hearings in his case." *Britton* v. *Maloney,* 196 F.3d 24, (1st Cir. 1999). "Britton's criminal prosecution in this case did not impose any restrictions on his liberty other than the legal obligation to appear in court at a future date. Britton merely received a summons in the mail. He was never arrested on the charges at issue. Nothing in the record indicates that he had to post a bond or to limit his travel before the ultimate hearing in which those charges were dismissed for want of prosecution." *Id.* Although Britton spends several pages of his Petition, specifically pages 24-26, articulating that the First Circuit overlooked several factors in determining whether there were restrictions on his liberty, nothing in the trial record indicates that this is the case. In fact, there is nothing in the trial record that demonstrates that a bond in any amount was posted by Britton or that his travel was limited in any way.

Britton argued to the First Circuit that the summons alone constituted a seizure because it threatened him with arrest if he failed to appear.

The First Circuit concluded that "the Supreme Court's Fourth Amendment jurisprudence belies Britton's claim that he was seized." *Id.* at 29.

"Neither the use of physical force nor a show of authority amounts to a seizure unless it results in the "intentional *acquisition* of physical control" over the subject and causes a "termination of [his] freedom of movement." *Id. citing, Brower* v. *County of Inyo,* 489 U.S. 593, 596-97 (1989). In order for a seizure to occur, the subject must "yield" to the assertion of authority over him and thereby have his liberty restrained. *See California* v. *Hodari D.,* 499 U.S. 621, 626 (1991).

The First Circuit determined that absent any evidence that Britton was arrested, detained, restricted in his travel, or otherwise subject to a deprivation of his liberty before the charges against him were dismissed, the fact that he was given a date to appear in court is insufficient to establish a seizure within the meaning of the Fourth Amendment. *Id., citing, Cf. Depiero* v. *City of Macedonia,* 180 F.3d 770, 789 (6th Cir. 1999). As a result they concluded that Maloney was entitled to judgment as a matter of law on Britton's constitutional malicious prosecution claim.

Next, Britton tries to save his Fourth Amendment claim by arguing that the First Circuit overlooked the fact that (1) he was released on his own recognizance on a $500 Personal Recognizance Bond under the mandatory condition that he "not depart without leave," and (2) a warrant was authorized for his arrest before he appeared in Court. In fact both issues were clearly addressed.

Britton's Petition to the Supreme Court is the first time he articulates the argument that a warrant was authorized for his arrest. This was not discussed in the First Circuit nor was any evidence introduced in the trial court regarding this alleged fact. Thus it may not be raised for the first time to the Supreme Court. *DeShaney* v. *Winnebago County Department of Social Services, et al.*, 489 U.S. 189, 109 S. Ct. 998, 1003, n.2 (1989). In addition, Britton articulated this bond argument for the first time in his Petition for Rehearing dated and filed on December 23, 1999. The First Circuit disposes of this argument in two paragraphs. The First Circuit held in their Order denying the Petition for Rehearing dated December 23, 1999 that

> "the existence of a bond was not argued during the proceedings below. When asked at trial to explain the circumstances of his criminal case, Britton testified that he "just waited and eventually a summons appeared in the mail." The issue briefly arose when Maloney's attorney spoke in the arguments before the First Circuit and when given the opportunity to present his side of the case, Britton never said that he had been required to post a bond. He has waived any significance that the bond might have because "a party cannot be permitted to raise a new issue for the first time

> on a petition for rehearing in the court of appeals."

Anderson v. *Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir. 1990). (App. C, page 92a).

In any event, the only document that arguably make a reference to a bond is Trial Exhibit 3, which is a docket sheet from Britton's criminal proceedings in state court. Contrary, to what Britton implies in his Petition to the Supreme Court as well as what he implied in his Petition for Rehearing to the First Circuit, the document does not use the word "bond" at all . . . and it is impossible to tell whether this notation refers to a $500 bond, as Britton contends and Britton never introduced any evidence at trial to show the significance, if any, of this document. The First Circuit has correctly determined that any issue as to a "bond" has been waived. Thus, these issues were properly decided in the First Circuit.

III. THE FIRST CIRCUIT'S REMAND OF DETERMINATION OF THE DAMAGES AWARD IS PROPER.

The First Circuit rejected the jury's determination of liability on the only claim for which it awarded damages,[2] while upholding its determi-

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[2] The jury awarded Britton $200,000.00 on his federal constitutional claim.

nation of liability on a claim[3] for which no damages were given. The First Circuit suggested that it could not be certain that Britton was "not entitled to any recovery for the wrongful initiation of criminal proceedings against him," *Britton* at 32, let alone the $200,000.00.

The First Circuit pointed out several deficiencies in the verdict slip form which it felt resulted in plain error to both parties.

First, neither party attempted at trial to distinguish between the damages that Britton allegedly suffered because of the purported seizure challenged in his federal constitutional claim and the malicious prosecution complained of under state law.

Second, the First Circuit determined that a further complication arose when the district judge charged the jury as to double recovery and damages.[4] The First Circuit held "that it was highly likely that the jury failed to award damages on the state law malicious prosecution claim because it thought that any additional recovery would duplicate the damages that it had already awarded for the alleged violation of Britton's Fourth

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[3] The jury awarded Britton $0.00 on his state law malicious prosecution claim.

[4] The district judge included the following charge to the jury: "By the way, the plaintiff is not entitled to double recovery. Therefore, if you award him damages for his suffering from, for the constitutional claims, the 1983 claim, you may no award more damages under the common law claim. In other words, all of these are allegations that pertain to the same damages. And you can't award double damages for each of these violations. . . ."

Amendment rights," *Britton* v. *Maloney,* 196 F.3d 24, 32 (1st Cir. 1999), thus giving "an instruction whose literal effect was to prevent the jury from awarding any state law damages at all once it awarded damages on the federal constitutional claim." *Id.* As it is difficult, if not impossible, to speculate as to how much, if anything, the jury would have awarded for a state law claim as opposed to a violation of constitutional rights, the First Circuit had no choice but to remand the damages portion for reconsideration.

Third, Britton should have objected to this instruction before the jury was discharged. Without a contemporaneous objection to preserve the issue of appeal, the First Circuit can only reverse for "plain error," *Britton* v. *Maloney,* 196 F.3d 24, 32 (1st Cir. 1999), *citing, M & I Heat Transfer Prods., Ltd.* v. *Gorchev,* 141 F.3d 21, 23 (1st Cir. 1998). This was done in this case because the error is clear and that prejudice is almost certain. *Id.* at 32-33, *citing, Drohan* v. *Vaughn,* 176 F.3d 17, 21 (1st Cir. 1999) and the result would create a miscarriage of justice or undermine the integrity of the judicial process. *Id.* at 33.

"Wrongful seizures and wrongful prosecutions are not identical concepts," *Id.,* therefore, no one can guess that the jury would have awarded Britton $200,000.00 if it had focused its attention solely on his state law claims. The First Circuit therefore determined that the best resolution of the error, since "the parties did not provide them with any argument or authority on how to handle the problem," was to direct a new trial on damages pursuant to their general authority to re-

mand in the interests of justice. *Id. See also,* 28 U.S.C. § 2106.

IV. THE FIRST CIRCUIT PROPERLY DETERMINED THAT THERE WAS NO FOURTH OR FOURTEENTH AMENDMENT VIOLATION BASED UPON THE RETENTION OF BRITTON'S RIFLE OR THE BRIEF INITIAL DETENTION OF BRITTON.

In response to Britton's argument that the seizure of his rifle was unlawful, the First Circuit pointed out that at oral argument, "Britton all but conceded that the initial seizure of the rifle was constitutionally valid, and they had little trouble reaching that conclusion." *Britton* v. *Maloney,* 196 F.3d 24, 35 (1st Cir. 1999). Based on the facts it was determined that Maloney and Dooley justifiably took the weapon away. As a result, the only issue before the First Circuit was whether Maloney violated the Fourth Amendment by confiscating the rifle for "safekeeping" after the perceived "emergency" had been defused and Britton was allowed to leave. The First Circuit held that the notion that Maloney's retention of the rifle constituted an independent violation of the Fourth Amendment would seem to trivialize the gravity of constitutional torts, especially when only three days elapsed between the time that Maloney seized the rifle and the time that it became evidence in a pending criminal proceeding. *Id.*

The First Circuit determined that there are many instances in which the lawful seizure of property results in a brief delay before its return. It makes little sense to treat each of those delays as an actionable violation of the Fourth Amendment. *Id.* at 36, *citing, Towers* v. *City of Chicago,* 173 F.3d 619, 629 n.7 (7th Cir.), *cert. denied,* 68 U.S.L.W. 3228 (1999). Thus, they sustained the district court's dismissal of this claim.

The First Circuit determined, based on the facts, that if the initial detention was a seizure, Maloney was justified in effecting it. It was appropriate for Maloney to detain Britton for further questioning while his rifle was inspected, his FID card was examined and a check for any outstanding warrants against him was performed. Maloney allowed him to leave as soon as Britton had explained himself and the circumstances of the incident. With these facts in mind, we cannot say that Maloney's decision to question Britton violated his Fourth Amendment rights. *Id.* at 35, *citing, Elkins* v. *United States,* 364 U.S. 206, 222 (1960).

The First Circuit also determined that Britton's claim that "Maloney effectively forced him to stay at the station is equally untenable." *Britton* at 35. "Britton simply could have left and demanded the rifle back later, especially because he had a receipt in hand. Because the seizure of his property did not amount to a seizure of his person," *Id.* the First Circuit held that the district court properly granted judgment as a matter of law against Britton. Thus there was no independent claim for

a wrongful seizure based upon the retention of the rifle.

CONCLUSION

For all the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted
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